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Supreme Court of the United States

OCTOBER TERM, 1934—No. 178.

BALTIMORE & CAROLINA LINE, INC.,

Petitioner,

—against—

DONALD REDMAN,

Respondent.

REPLY BRIEF FOR THE PETITIONER.

Statement.

Respondent does not argue the merits of the constitutional question presented by this appeal. The Seventh Amendment, its interpretation by the *Slocum* case and, as so interpreted, its application to the case at bar are not discussed. As to this phase of the case, respondent limits himself to the single contention that the state of the record does not permit this Court to determine the question presented. This contention will be shown to be erroneous.

FIRST POINT.

The question whether the District Court should have dismissed the complaint on the merits or without prejudice, was presented by the record to the Circuit Court of Appeals.

Respondent contends that the question as to whether the District Court should have dismissed the complaint

without prejudice was not presented by the record to the Circuit Court of Appeals because: "The trial court was never asked to dismiss 'without prejudice'. That question was never raised in the trial court" (Brief, pp. 9-10).

In this, respondent is mistaken. Upon the trial, at the close of respondent's case, and again, at the end of the entire case, motions were made by petitioner to dismiss the complaint (R., pp. 142-145, fols. 174-178; p. 242, fol. 295). Respondent correctly states that these motions were made for lack of proof (Brief, p. 9).

Each of these was such a motion to dismiss as is governed by Section 482 of the New York Civil Practice Act (cited by respondent), which provides in part as follows:

> "A dismissal of a complaint * * * at the close of the plaintiff's * * * evidence, or a dismissal of the complaint * * * at the close of the whole case, is a final determination of the merits of the cause of action * * * *unless the Court shall dismiss without prejudice.*" (Italics ours.)

Both by its expressed terms, and as interpreted by local authorities, this statutory provision permits the trial court, whenever a motion to dismiss the complaint is made, to dismiss either on the merits or without prejudice, in the exercise of a sound discretion.

Thus, in *Riley* v. *Pierce Oil Corporation*, 245 N. Y. 152, the complaint was dismissed for failure to prove the law of Mexico. The judgment of dismissal was unanimously affirmed by the Appellate Division (217 App. Div. 744). Upon appeal, the Court of Appeals held that the complaint had been properly dismissed for failure of proof in the absence of evidence as to the applicable law of Mexico, and remarked (p. 154):

> "Whether, had such defects in the evidence been

supplied there should have been a dismissal of the complaint, we need not decide. As it stands, the judgment is a final determination on the merits (Civ. Prac. Act, Sec. 482). *The discretion exercised below in this regard we may not disturb.*" (Italics ours.)

In accord: *Jules Maes & Co., Inc.* v. *W. R. Grace & Co.*, 239 N. Y. 519, 520; *Demarest* v. *Westchester Fire Insurance Company of New York* (First Department), 234 App. Div. 556, 560; *Cabang* v. *United States Shipping Board Merchant Fleet Corporation* (Second Department), 227 App. Div. 751; *Littrell* v. *Allemania Fire Insurance Co.* (Third Department), 224 App. Div. 523; *Ziegler* v. *International Railway Company* (Fourth Department), 232 App. Div. 43, 44.

Under the Conformity Act, the District Court, sitting in New York, has like discretion, unless deprived of it by the Seventh Amendment (Revised Statutes, Section 914; 28 U. S. Code Annotated, Section 724).

It is thus clear, that when the petitioner made its motions in the instant case, it, in effect, requested the District Court to dismiss the complaint either upon the merits, or without prejudice, as sound discretion might dictate.

This the trial court declined to do (R., p. 260, fols. 319-320). Its refusal was specifically assigned as error upon appeal to the Circuit Court of Appeals for the Second Circuit (R., p. 272, fol. 339).

Thus, the Circuit Court of Appeals had presented to it by the record the question as to whether or not the District Court should have dismissed the complaint, either on the merits, or without prejudice.

On appeal to that Court the petitioner urged that if the Circuit Court of Appeals should find that the complaint should have been dismissed at any stage of the proceedings below, the judgment should be reversed and the District Court directed to enter judgment dismissing the complaint

without prejudice. That the point was argued and considered by the Circuit Court of Appeals is self-evident from the opinion of that Court wherein it is said (p. 638):

> "We have no power to direct a dismissal without prejudice as the appellant urges. *Slocum* v. *New York Life Insurance Co.*, 228 U. S. 364."

While petitioner did not request the Circuit Court of Appeals to direct a dismissal on the merits (because that Court had already decided that the *Slocum* case did not permit it), by clear implication, the Circuit Court of Appeals held itself powerless to direct such a dismissal. For, if, as it decided, it could not constitutionally non-suit the respondent, even with a chance to sue again, it surely would not assert constitutional power to preclude respondent from further suit by the direction of a dismissal on the merits.

Respondent's statement (Brief, p. 10) "that a motion to dismiss 'without prejudice' can only properly be made *in terms* and at the end of the plaintiff's case," is without the citation of any supporting authorities and, indeed, is contrary to established local trial practice.

In *Royal Card and Paper Co.* v. *Dresdner Bank*, 27 F. (2d) 791, a motion for a non-suit was made by defendant and the trial judge reserved decision until after a verdict for the plaintiff, when the motion was granted and the complaint dismissed *upon the merits*. On appeal it was held that although a dismissal *upon the merits* was not permissible, there was no error in disregarding the verdict and granting a dismissal *without prejudice*. The judgment below was accordingly modified.

Identical procedure was upheld as constitutional in *Italian Star Line, Inc.* v. *United States Shipping Board Emergency Fleet Corporation*, 53 F. (2d) 359, wherein the

state practice was followed by the District Court pursuant to the Conformity Act. In neither of these cases does it appear that a motion for a dismissal without prejudice was made *in terms*. In the first cited case, the very contrary is indicated.

Apart from this, however, even if petitioner had *expressly* moved to dismiss without prejudice, the record demonstrates that the trial judge would have denied the motion, for in passing upon the motion as made, he said: *"There was sufficient to go to the jury.* I will deny your motion now and give you an exception" (R., p. 260, fol. 320).

The decided cases discredit respondent's contention (Brief, p. 10) that when a motion is made to dismiss the complaint at the end of the plaintiff's case, "it should *then* be granted or denied." For, "it is not at all unusual in this [Southern] district to reserve decision, on consent of the parties, on motions to dismiss until after the verdict of the jury." *Italian Star Line Inc.* v. *United States Shipping Board Emergency Fleet Corporation*, 41 F. (2d) 382, 384.

Respondent's statement (Brief, p. 10) that if, after moving to dismiss at the close of the plaintiff's case, "defendant goes ahead with its case, it waives its motion" is not accurate. This is true only if the motion is *denied when made* or the defendant *fails to renew* the motion at the close of the entire case. *Union Pacific Railway Co.* v. *Daniels*, 152 U. S. 684; *Columbia & Puget Sound R. R. Co.* v. *Hawthorne*, 144 U. S. 202, 206; *Hopkins* v. *Clark*, 158 N. Y. 299, 304; *Sigua Iron Co.* v. *Brown*, 171 N. Y. 488, 505-506.

In the case at bar, decision of the motion to dismiss at the close of the plaintiff's case was *reserved* without objection (R., p. 145, fol. 178). The motion was *renewed* at the close of the entire case and decision again *reserved*,

without objection, until after verdict (R., p. 242, fol. 295), when both motions were denied (R., p. 230, fols. 319-320).

With the record in this condition, it is respectfully submitted that the question as to whether or not the District Court should have dismissed the complaint on the merits or without prejudice, was properly presented to the Circuit Court of Appeals.

SECOND POINT.

This Court has power, on this record, to direct a dismissal on the merits.

As shown above, the condition of the record was such as to permit the Circuit Court of Appeals to decide that the District Court should have dismissed the complaint upon the merits, and if it so determined, to direct such a dismissal, unless prevented from so doing by the Seventh Amendment. Respondent argues, however (Brief, p. 11), that since petitioner did not request the Circuit Court of Appeals to direct the District Court to dismiss the complaint on the merits, but simply asked that a dismissal without prejudice be directed, this Court may not direct a dismissal upon the merits even if the record indicates that this should have been done below.

If it is true that this Court on writ of certiorari to the Circuit Court of Appeals is limited to a consideration of the points made *upon the argument* before that Court, rather than the issues presented by the record, then respondent is not entitled to consideration by this Court of the objections raised in Point I of his brief, which were not presented in the Circuit Court of Appeals and which are urged for the first time on this appeal.

The best refutation of his contention, however, is to be

found under Point Three of respondent's brief (p. 12) where this statement is made:

> "By the operation of the writ of certiorari, the entire record is now before this Court with power to decide the case as it was presented to the Circuit Court of Appeals. This Court may now direct such disposition of the case as the Circuit Court of Appeals might have done."

The case of *Langnes* v. *Green*, 282 U. S. 531, cited by respondent, supports this assertion. Mr. Justice Sutherland, expressing the unanimous opinion of the Court, there says (pp. 536-537):

> "What is the scope of inquiry in this Court when the case is brought up by certiorari from the circuit court of appeals? It has been decided that upon writ of error from an intermediate appellate tribunal we are not limited to a consideration of the points raised by the plaintiff, 'but must enter the judgment, which should have been rendered by the court below on the record then before it.' *Baker* v. *Warner*, 231 U. S. 588, 593. And in *Delk* v. *St. Louis & San Francisco R. Co.*, 220 U. S. 580, 588, following *Lutcher & Moore Lumber Co.* v. *Knight*, 217 U. S. 257, 267, it was held that on certiorari, likewise, the entire record is before this court with power to review the action of the court of appeals and direct such disposition of the case as that court might have done upon the writ of error sued out for the review of the circuit (now district) court. In *Watts, Watts & Co.* v. *Unione Austriaca*, 248 U. S. 9, 21, it was said that, 'This court, in the exercise of its appellate jurisdiction, has power not only to correct error in the judgment entered below, but to make such disposition of the case as justice may at this time require' * * *."

In *Baker v. Warner*, 231 U. S. 588, the situation is thus presented and considered by this Court (p. 593):

> "The plaintiff, Baker, had a judgment in the trial court. The defendant, Warner, took the case to the Court of Appeals on various grounds, most of which were sustained. The plaintiff then brought the case here, assigning error on some of those rulings but not on others. *We are not limited, however, to a consideration of the points presented by plaintiff, but, this being a writ of error from an intermediate appellate tribunal, must enter the judgment, which should have been rendered by the Court below on the record then before it.*" (Italics ours.)

It is to be noted that in the cases cited, this Court considered objections to the decree below urged by *respondent* even though respondent had filed no cross petition for certiorari. It would seem *a fortiori* that where, as here, a petition for certiorari has been filed and granted, this Court need not limit itself to a consideration of the specific points raised by the petitioner but may "enter the judgment which should have been rendered by the court below on the record then before it."

Should this Court discover error in the decisions below, it need not remand the case to the Circuit Court of Appeals for further proceedings, but may itself make a final disposition of the cause, following the procedure adopted in *Delk v. St. Louis and San Francisco R. R.*, 220 U. S. 580, wherein it is said (pp. 588-589):

> "As the case is here upon certiorari to review the judgment of the Circuit Court of Appeals, this Court has the entire record before it with the power to review the action of that Court as well as direct such disposition of the case as that Court might have done when hearing the writ of error sued out for the review of the action of the Circuit Court."

The rule was again applied in *Watts, Watts & Co.* v. *Unione Austriaca*, 248 U. S. 9, 21, in which it was held that: "This court, in the exercise of its appellate jurisdiction, has power not only to correct error in the judgment entered below, *but to make such disposition of the case as justice may at this time require.*" (Italics ours.)

From the foregoing it follows that this Court has power on this record to direct a dismissal either on the merits or without prejudice.

THIRD POINT.

Respondent is not entitled to review by this Court of the decree of the Circuit Court of Appeals and the judgment of the District Court.

When the petition for a writ of certiorari was filed in this Court by petitioner, respondent concurrently filed a cross-petition to review the decree of the Circuit Court of Appeals for the Second Circuit reversing the judgment of the District Court for the Southern District of New York entered upon the verdict rendered in that Court in favor of respondent. In his cross-petition and supporting brief, respondent discussed at length the sufficiency of the evidence presented upon the trial in the District Court, and sought to obtain further review thereof by this Court.

On October 8th, 1934 this Court simultaneously granted certiorari to the petitioner and denied the same to the respondent. Despite the Court's denial of his cross-petition and refusal to review the evidence presented below, respondent now seeks to obtain indirectly that very result upon the hearing of this appeal. It is too clear for citation that the denial of a writ of certiorari, while it is not to be construed as agreement by this Court with the conclusions reached in lower tribunals, is nevertheless indication that this Court does not desire to review the subject matter presented.

While undoubtedly the Court may, if it so wishes, reconsider its denial of respondent's petition and, on this appeal, take cognizance of the matters presented therein, no moving reasons are advanced in respondent's brief for the exercise of such discretion.

The cases of *Langnes* v. *Green*, 282 U. S. 531, *Alexander* v. *Cosden Co.*, 290 U. S. 484, and *Story Parchment Co.* v. *Patterson Co.*, 282 U. S. 555, cited by respondent (Brief, p. 12) are not apposite. Although it is true that in these cases this Court, on certiorari, considered respondent's contentions of error, in none of them had this Court previously denied the respondent's petition for certiorari.

Respectfully submitted,

GEO. WHITEFIELD BETTS, JR.,
Counsel for Petitioner,
120 Broadway,
New York City.

WILLIAM R. MEAGHER,
Of Counsel.